



48 CFR Chapter 4

[Docket No. USDA-2022-0002]

RIN 0599-AA28

Agriculture Acquisition Regulation (AGAR)

AGENCY: United States Department of Agriculture.

ACTION: Proposed rule.

SUMMARY: The United States Department of Agriculture (USDA) is proposing to make amendments to the Agriculture Acquisition Regulation (AGAR) to align the AGAR with changes to acquisition law, regulations, and internal USDA policies since the AGAR's last major revision in 1996.

DATES: Interested parties should submit written comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to the proposed rule to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for "AGAR." Follow the instructions provided on the "Comment Now" screen. If your comment cannot be submitted using Regulations.gov, email the point of contact in the FOR FURTHER INFORMATION CONTACT section of this document for alternate instructions.

FOR FURTHER INFORMATION CONTACT: Crandall Watson, Chief, Procurement Policy Division, Office of Contracting and Procurement, Telephone: (202) 720-7529; Email: Procurement.Policy@usda.gov.

SUPPLEMENTARY INFORMATION: This rulemaking is necessary to update the AGAR located in 48 CFR parts 401 through 499.

I. Background:

The Agriculture Acquisition Regulation (AGAR) implements the Federal Acquisition Regulation (FAR) (48 CFR ch. 1) where further implementation is needed, and supplements the FAR when coverage is needed for subject matter not covered by the FAR. The Department of Agriculture (USDA) identified parts of the AGAR which required updating or streamlining based on updates to acquisition law, regulations, and internal USDA policies. USDA's review indicated that almost all parts of the AGAR required revision. Accordingly, USDA has reviewed and revised substantially all parts of the AGAR.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed rule is an internal rule of agency procedure and therefore is not a significant regulatory action under Executive Order 12866.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 553) or any other statute. Under section 605(b) of the RFA, however, if the head of an agency certifies that a rule will not have a significant impact on a substantial number of small entities, the statute does not require the agency to prepare a regulatory flexibility analysis.

The proposed changes would update the AGAR to bring it up to date and to make sure correspondence with the FAR is maintained. The proposed rule would amend the AGAR to correct and update internal references to the FAR; to remove sections supplementing material

that has been removed from the FAR; and to update designations of USDA. Therefore, pursuant to section 605(b), USDA certifies that this proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities.

IV. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in

48 CFR Part 401

Government procurement, Reporting and recordkeeping requirements.

48 CFR Parts 402, 405 through 406, 411 through 416, 434 through 437, and 447 through 470

Government procurement.

48 CFR Part 403

Antitrust, Conflict of interest, Government procurement.

48 CFR Part 404

Classified information, Government procurement.

48 CFR Part 408

Government procurement, Printing.

48 CFR Part 419

Government procurement, Small businesses.

48 CFR Part 422

Equal employment opportunity, Government procurement, Individuals with disabilities, Labor.

48 CFR Part 423

Air pollution control, Government procurement, Occupational safety and health, Water pollution control.

48 CFR Part 425

Foreign currencies, Foreign trade, Government procurement.

48 CFR Part 428

Government procurement, Insurance, Surety bonds.

48 CFR Parts 430 through 432

Accounting, Government procurement.

48 CFR Part 433

Administrative practice and procedure, Government procurement.

48 CFR Part 445

Government procurement, Government property.

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For the reasons set out in the preamble, and under the authority of 5 U.S.C. 301 and 40 U.S.C. 486(c), USDA proposes to revise 48 CFR chapter 4 to read as follows.

Chapter 4 – Department of Agriculture

SUBCHAPTER A General

PART 400 [Reserved]

PART 401 AGRICULTURE ACQUISITION REGULATION SYSTEM

PART 402 DEFINITIONS OF WORDS AND TERMS

PART 403 IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS

PART 404 ADMINISTRATIVE AND INFORMATION MATTERS

SUBCHAPTER B Acquisition Planning

PART 405 PUBLICIZING CONTRACT ACTIONS

PART 406 COMPETITION REQUIREMENTS

PART 407 [Reserved]

PART 408 REQUIRED SOURCES OF SUPPLIES AND SERVICES

PARTS 409 and 410 [Reserved]

PART 411 DESCRIBING AGENCY NEEDS

PART 412 ACQUISITION OF COMMERCIAL ITEMS

SUBCHAPTER C Contracting Methods and Contract Types

PART 413 SIMPLIFIED ACQUISITION PROCEDURES

PART 414 SEALED BIDDING

PART 415 CONTRACTING BY NEGOTIATION

PART 416 TYPES OF CONTRACTS

PARTS 417 and 418 [Reserved]

SUBCHAPTER D Socioeconomic Programs

PART 419 SMALL BUSINESS PROGRAMS

PARTS 420 and 421 [Reserved]

PART 422 APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

PART 423 ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE

ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE

WORKPLACE

PART 424 [Reserved]

PART 425 FOREIGN ACQUISITION

PART 426 [Reserved]

SUBCHAPTER E General Contracting Requirements

PART 427 [Reserved]

PART 428 BONDS AND INSURANCE

PART 429 [Reserved]

PART 430 COST ACCOUNTING STANDARDS ADMINISTRATION

PART 431 CONTRACT COST PRINCIPLES AND PROCEDURES

PART 432 CONTRACT FINANCING

PART 433 PROTESTS, DISPUTES AND APPEALS

SUBCHAPTER F Special Categories of Contracting

PART 434 MAJOR SYSTEM ACQUISITION

PART 435 [Reserved]

PART 436 CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

PART 437 SERVICE CONTRACTING

PARTS 438 through 441 [Reserved]

SUBCHAPTER G Contract Management

PARTS 442 through 444 [Reserved]

PART 445 GOVERNMENT PROPERTY

PARTS 446 through 448 [Reserved]

PART 449 TERMINATION OF CONTRACTS

PART 450 EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

PART 451 [Reserved]

SUBCHAPTER H Clauses and Forms

PART 452 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

PARTS 453 through 469 [Reserved]

SUBCHAPTER I Food Assistance Programs

PART 470 COMMODITY ACQUISITIONS

PARTS 471 through 499 [Reserved]

Subchapter A General

PART 400 [Reserved]

PART 401 -- AGRICULTURE ACQUISITION REGULATION SYSTEM

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Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 401.1—PURPOSE, AUTHORITY, ISSUANCE

401.101 Purpose.

The United States Department of Agriculture's (USDA's) Acquisition Regulation (AGAR) provides for the codification and publication of uniform policies and procedures for acquisitions by contracting activities within USDA. The purpose of the AGAR is to implement the Federal Acquisition Regulation (FAR), where further implementation is needed, and to supplement the FAR when coverage is needed for subject matter not covered in the FAR. The AGAR is not by itself a complete document, as it must be used in conjunction with the FAR.

401.103 Authority.

The AGAR and subsequent amendments are issued under 5 U.S.C. 301 and 40 U.S.C. 486(c). The Senior Procurement Executive (SPE) has the delegated authority to transmit Departmental acquisition regulations.

401.104 Applicability.

The FAR and AGAR apply to all USDA acquisitions of supplies and services (including construction) which obligate appropriated funds, unless otherwise specified or excepted by law.

401.105 Issuance.

401.105-1 Publication and code arrangement.

(a) The AGAR is codified in the Code of Federal Regulations (CFR) as chapter 4 of title 48, Federal Acquisition Regulations System, to implement and supplement chapter 1 which constitutes the FAR. Parts 400 through 499 have been assigned to USDA by the Office of the Federal Register.

(b) The AGAR and its subsequent changes are published in:

- (1) Daily issues of the Federal Register;
- (2) Cumulative form in the CFR; and
- (3) Electronic form on the USDA Departmental Administration procurement website (see AGAR 401.170).

(c) Section 553(a)(2) of the Administrative Procedure Act, 5 U.S.C. 553, provides an exception from the standard public rulemaking procedures to the extent that the rule involves a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(d) The AGAR may be revised from time to time in accordance with the rulemaking procedures of the Administrative Procedure Act. The USDA is also required to publish for public comment procurement regulations in the Federal Register, pursuant to the Office of Federal Procurement Policy Act (41 U.S.C. 418b), and FAR 1.301.

401.105-2 Arrangement of regulations.

AGAR coverage parallels the FAR in format, arrangement, and numbering system. However, subdivisions below the section and subsection levels may not always correlate directly to FAR designated paragraphs and subparagraphs.

401.105-3 Copies.

Copies of the AGAR published in the CFR form may be purchased from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402. Requests should reference chapter 4 of title 48 CFR.

401.170 Electronic access to regulatory information.

The USDA procurement website provides access to the AGAR, AGAR amendments (circulars), the USDA Contracting Desk Book, and other USDA procurement policy and guidance.

SUBPART 401.2— ADMINISTRATION

401.201 Maintenance of the FAR.

401.201-1 The two councils.

(a) USDA's representative on the Civilian Agency Acquisition Council is designated by the SPE.

(b) The USDA Office of Contracting and Procurement, Procurement Policy Division will coordinate proposed FAR revisions within USDA.

SUBPART 401.3--AGENCY ACQUISITION REGULATIONS

401.301 Policy.

(a) The SPE, subject to the authorities in AGAR 401.103 and FAR 1.301, may issue and publish Departmental regulations, that together with the FAR constitute Department-wide policies, procedures, solicitation provisions, and contract clauses governing the contracting process or otherwise controlling the relationship between USDA (including any of its contracting activities) and contractors or prospective contractors.

(b) Each designated Mission Area senior contracting official is authorized to issue or authorize the issuance of, at any organizational level, internal guidance which does not have a significant effect beyond the internal operating procedures of the activity, or a significant cost or administrative impact on offerors or contractors. Internal guidance issued by contracting activities will not be published in the Federal Register. Mission Area contracting leadership shall ensure that the guidance, procedures, or instructions issued--

(1) Are consistent with the policies and procedures contained in this regulation and the USDA Contracting Desk Book;

(2) Follow the format, arrangement, and numbering system of this regulation to the extent practicable;

(3) Contain no material which duplicates, paraphrases, or is inconsistent with this regulation; and

(4) Are numbered and identified by use of alphabetical suffices to the chapter number as follows:

(i) Marketing and Regulatory Programs (MRP).

(ii) Research, Education and Economics (REE).

(iii) Food, Nutrition and Consumer Services (FNCS).

- (iv) Natural Resources and Environment (NRE).
- (v) Farm Production and Conservation (FPAC).
- (vi) Food Safety and Inspection Services (FSIS).
- (vii) [Reserved]
- (viii) Departmental Administration (DA) or Departmental Management (DM).
- (ix) [Reserved]
- (x) Rural Development (RD).

401.304 Agency control and compliance procedures.

(a) The AGAR System is under the direct oversight and control of the SPE, who is responsible for review and issuance of all Department-wide acquisition regulations published in the Federal Register to assure compliance with FAR part 1.

(b) The SPE is also responsible for review and issuance of unpublished, Department-wide internal guidance under the AGAR System.

(c) The Mission Area senior contracting official is responsible for establishment and implementation of formal procedures for oversight and control of unpublished internal guidance issued within the contracting activity to implement FAR or AGAR requirements. These procedures shall be subject to the review and approval by the SPE.

(d) The SPE is responsible for evaluating coverage under the AGAR system to determine applicability to other agencies and for recommending coverage to the FAR Secretariat for inclusion in the FAR.

(e) Recommendations for revision of existing FAR coverage or new FAR coverage shall be submitted by the Mission Area senior contracting official to the SPE for further action.

401.370 Exclusions.

Subject to the policies of FAR 1.3, certain USDA acquisition policies and procedures may be excluded from the AGAR under appropriately justified circumstances, such as:

- (a) Subject matter which is effective for a period less than 12 months.

(b) Subject matter which is instituted on an experimental basis for a reasonable period.

(c) Acquisition procedures instituted on an interim basis to comply with the requirements of statute, regulation, Executive Order, Office of Management and Budget (OMB) Circular, or Office of Federal Procurement Policy (OFPP) Policy Letter.

401.371 USDA Contracting Desk Book.

(a) The SPE may issue and update the USDA Contracting Desk Book, consistent with the policies of the FAR and the AGAR, for the following purposes:

(1) To communicate Department-wide policy and/or procedural guidance to contracting activities;

(2) To delegate to procurement officials the authority to make determinations or to take action to implement the policies of the FAR or the AGAR; and,

(3) To establish internal policy and procedures on an interim basis, prior to incorporation in the AGAR or in a Departmental Directive.

(b) The USDA Contracting Desk Book is only available in electronic format on the USDA procurement website.

401.372 Departmental directives.

Subject to the policies of FAR 1.3, USDA from time to time may issue internal directives to establish procedures, standards, guidance, methods of performing duties, functions, or operations. Such directives include Departmental Regulations (DRs), Departmental Notices, and Secretary's Memoranda.

SUBPART 401.4—DEVIATIONS FROM THE FAR AND AGAR

401.402 Policy.

Requests for authority to deviate from the provisions of the FAR or the AGAR shall be submitted in writing as far in advance of the situation as time will permit. Each request for deviation shall contain the following:

- (a) A statement of the deviation desired, including identification of the specific paragraph number(s) of the FAR and AGAR;
- (b) The reason why the deviation is considered necessary or would be in the best interest of the Government;
- (c) If applicable, the name of the contractor and identification of the contract affected;
- (d) A statement as to whether the deviation has been requested previously and, if so, circumstances of the previous request;
- (e) A description of the intended effect of the deviation;
- (f) A statement of the period of time for which the deviation is needed; and
- (g) Any pertinent background information which will contribute to a full understanding of the desired deviation.

401.403 Individual deviations.

In individual cases, deviations from either the FAR or the AGAR will be authorized only when essential to effect a necessary acquisition or where special circumstances make such deviations clearly in the best interest of the Government. Except for cost principles, the Head of the Contracting Activity (HCA) may approve individual deviations from the AGAR, after coordinating with the Office of General Counsel (OGC) and the SPE. No deviations from the FAR or AGAR may be authorized by an individual contracting officer or an individual contracting office. A copy of each deviation and its supporting documents shall be provided to the SPE. Deviations from the FAR shall not be made unless such action is authorized by the SPE after consultation with the OGC and any other appropriate office, based on a written justification stating clearly the special circumstances involved.

401.404 Class deviations.

Where deviations from the FAR or AGAR are considered necessary for classes of contracts, requests for authority to deviate shall be submitted in writing to the SPE for approval. The SPE may authorize class deviations from the FAR without consulting the Chairperson of the

Civilian Agency Acquisition Council (CAAC) where urgency precludes consultation. The SPE shall subsequently inform the Chairperson of the CAAC of the deviation, including the circumstances under which it was required.

SUBPART 401.6—CAREER DEVELOPMENT, CONTRACTING AUTHORITY, AND RESPONSIBILITIES

401.601 General.

(a) The authority and responsibility vested in the Secretary to manage USDA's acquisition function is delegated through the Assistant Secretary for Administration to the SPE. This broad authority includes, but is not limited to, the following responsibilities:

- (1) Prescribing and publishing Departmental acquisition policies, regulations, and procedures.
 - (2) Taking any necessary actions consistent with policies, regulations, and procedures with respect to purchases, contracts, leases, and other transactions.
 - (3) Designating contracting officers.
 - (4) Establishing clear lines of contracting authority.
 - (5) Evaluating and monitoring the performance of USDA's acquisition system.
 - (6) Managing and enhancing career development of the acquisition workforce.
 - (7) Participating in the development of Government-wide acquisition policies, regulations, and standards; and determining specific areas where government-wide performance standards should be established and applied.
 - (8) Determining areas of Department-unique standards and developing unique Department-wide standards.
 - (9) Certifying to the Secretary that the acquisition system meets approved standards.
- (b) The SPE may delegate specified contracting authority and the responsibility to manage related acquisition functions.

(c) Unless prohibited by the FAR, the AGAR, or by other applicable statutes and regulations, the SPE may redelegate specified authority to make determinations in order to implement the policies and procedures of the FAR. Such delegations shall be in writing but need not be published. Such delegations may be made by the HCA if authority has been delegated by the SPE.

401.602 Contracting officers.

401.602-3 Ratification of unauthorized commitments.

(a) *Ratification* means the signed, documented action taken by an authorized official to approve and sanction a previously unauthorized commitment. *Unauthorized commitment* means an agreement made by a Government representative who lacked the authority to enter into a contract on behalf of the Government.

(b) Procedures are in accordance with the USDA Contracting Desk Book, Part 401.602-3.

401.603 Selection, appointment, and termination of appointment for contracting officers.

401.603-1 General.

The SPE may delegate contracting authority to the extent authorized by general written delegation of acquisition authority appointing qualified individuals as contracting officers, in accordance with selection and appointment procedures as stated in the USDA Contracting Desk Book.

PART 402 DEFINITIONS OF WORDS AND TERMS

SUBPART 402.1 – DEFINITIONS

Sec.

402.101 Definitions.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 402.1--DEFINITIONS

402.101 Definitions.

Acquisition official means an individual who has been delegated authority to manage or to exercise acquisition functions and responsibilities.

Agency head or head of the agency means the Secretary of Agriculture (Secretary), Deputy Secretary, or the Assistant Secretary for Administration (ASA).

Head of the Contracting Activity (HCA) means the official with overall responsibility of one or more USDA contracting activities.

Mission Area senior contracting official means the official designated by the Senior Procurement Executive or Head of the Contracting Activity with specific responsibilities within an individual Mission Area's contracting activity.

Senior Procurement Executive (SPE) means the agency official appointed as such by the Head of the Agency pursuant to Executive Order 12931. The Director, Office of Contracting and Procurement, has been designated as the USDA SPE.

PART 403 IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS

SUBPART 403.1 – SAFEGUARDS

Sec.

403.101 Standards of conduct.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 403.1--SAFEGUARDS

403.101 Standards of conduct.

(a) The standards of conduct for USDA procurement officials are the uniform standards established by the Office of Government Ethics in 5 CFR part 2635, Standards of Ethical Conduct for Employees of the Executive Branch, and FAR 3.104, Procurement Integrity.

(b) Procurement officials and other employees who require advice concerning the application of standards of conduct to any acquisition issue shall obtain opinions from the USDA Office of Ethics or the ethics advisory officials within their agency.

PART 404 ADMINISTRATIVE AND INFORMATION MATTERS

Subpart 404.8 – Government Contract Files

Sec.

404.804 Closeout of contract files.

Subpart 404.13 -- Personal Identity Verification

404.1303 Contract clause.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 404.8 – GOVERNMENT CONTRACT FILES

404.804 Closeout of Contract Files

The contracting officer shall insert the clause at AGAR 452.204-70, Modification for Contract Closeout, in all solicitations and contracts that use simplified acquisition procedures.

SUBPART 404.13—PERSONAL IDENTITY VERIFICATION

404.1303 Contract clause.

FAR 4.13, Personal Identity Verification, establishes the policy and use requirements for FAR 52.204-9. The contracting officer shall insert a clause that contains language similar to that in AGAR 452.204-71 in all covered solicitations and contracts which include FAR 52.204-9.

Subchapter B Acquisition Planning

PART 405 PUBLICIZING CONTRACT ACTIONS

SUBPART 405.4 -- RELEASE OF INFORMATION

Sec.

405.404 Release of long-range acquisition estimates.

405.404-1 Release procedures.

SUBPART 405.5--PAID ADVERTISEMENTS

405.502 Authority.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 405.4--RELEASE OF INFORMATION

405.404 Release of long-range acquisition estimates.

405.404-1 Release procedures.

The HCA is the agency head designee pursuant to FAR 5.404-1.

SUBPART 405.5--PAID ADVERTISEMENTS

405.502 Authority.

The authority vested in the HCA to authorize publication of paid advertisements in newspapers (44 U.S.C. 3702) is delegated, with power of redelegation, to Mission Area senior contracting officials. A Mission Area senior contracting official's redelegation of this authority shall be in writing.

PART 406 COMPETITION REQUIREMENTS

SUBPART 406.2--FULL AND OPEN COMPETITION AFTER EXCLUSION OF SOURCES

Sec.

406.202 Establishing or maintaining alternative sources.

SUBPART 406.3--OTHER THAN FULL AND OPEN COMPETITION

406.302 Circumstances permitting other than full and open competition.

406.302-70 Otherwise authorized by law.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 406.2--FULL AND OPEN COMPETITION AFTER EXCLUSION OF SOURCES

406.202 Establishing or maintaining alternative sources.

The SPE is authorized to make determinations pursuant to FAR 6.202(a) and sign the determination and findings required by FAR 6.202(b).

SUBPART 406.3--OTHER THAN FULL AND OPEN COMPETITION

406.302 Circumstances permitting other than full and open competition.

406.302-70 Otherwise authorized by law.

(a) *Authority.* Section 1472 of the National Agricultural Research, Extension, and Teaching Policy Act of 1977 (7 U.S.C. 3318) (the Act) authorizes the Secretary of Agriculture to award contracts, without competition, to further research, extension, or teaching programs in the food and agricultural sciences.

(b) *Limitations.* The use of this authority is limited to those instances where it can be determined that contracting without full and open competition is in the best interest of the Government and necessary to the accomplishment of the research, extension, or teaching program. Therefore:

(1) Contracts under the authority of the Act shall be awarded on a competitive basis to the maximum practicable extent.

(2) When full and open competition is not deemed appropriate, the contracting officer shall make a written justification on a case-by-case basis in accordance with procedures in FAR 6.303 and 6.304.

PART 407 [Reserved]

PART 408 REQUIRED SOURCES OF SUPPLIES AND SERVICES

SUBPART 408.8—ACQUISITION OF PRINTING AND RELATED SUPPLIES

408.802 Policy.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 408.8—ACQUISITION OF PRINTING AND RELATED SUPPLIES

408.802 Policy.

The Director, Office of Communications (OC) has been designated as the central printing authority in USDA, with the authority to represent the USDA before the Joint Committee on Printing (JCP), the Government Printing Office, and other Federal and State agencies on all matters related to printing.

PARTS 409 and 410 [Reserved]

PART 411 DESCRIBING AGENCY NEEDS

SUBPART 411.1—SELECTING AND DEVELOPING REQUIREMENTS DOCUMENTS

Sec.

411.101 Order of precedence for requirements documents.

SUBPART 411.2---USING AND MAINTAINING REQUIREMENTS DOCUMENTS

411.202 Maintenance of standardization documents.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 411.1—SELECTING AND DEVELOPING REQUIREMENTS DOCUMENTS

411.101 Order of precedence for requirements documents.

(a) OMB Circular A-119 establishes a Federal policy requiring the use of voluntary consensus standards in lieu of government-unique standards except where inconsistent with law or otherwise impractical.

(b) An HCA is authorized to submit the determination required by OMB Circular A-119 that a voluntary standard is inconsistent with law or otherwise impracticable. The HCA must submit the determination to OMB through the National Institute of Standards and Technology (NIST) in accordance with the Circular with a copy provided to the SPE.

SUBPART 411.2---USING AND MAINTAINING REQUIREMENTS DOCUMENTS

411.202 Maintenance of standardization documents.

Recommendations for changes to standardization documents are to be submitted through the SPE, who will coordinate the submission of these recommendations to the cognizant preparing activity.

PART 412 ACQUISITION OF COMMERCIAL ITEMS

SUBPART 412.1—ACQUISITION OF COMMERCIAL ITEMS-GENERAL

Sec.

412.101 Policy.

SUBPART 412.3--SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS

412.302 Tailoring of provisions and clauses for the acquisition of commercial items.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 412.1—ACQUISITION OF COMMERCIAL ITEMS-GENERAL

412.101 Policy.

USDA has authority to issue rated orders under section 202(c) of Executive Order 13603, and the Defense Production Act of 1950, as Amended (DPA), 50 U.S.C. 4501 et seq. USDA has been given authority by the Secretary of Homeland Security for priorities and allocations of support for agriculture and food critical infrastructure, protection, and restoration: programs to protect or restore the agriculture and food system from terrorist attacks, major disasters, and other emergencies.

SUBPART 412.3--SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS

412.302 Tailoring of provisions and clauses for the acquisition of commercial items.

The HCA is authorized to approve waivers in accordance with FAR 12.302(c). The approved waiver may be either for an individual contract or for a class of contracts for the specific item. The approved waiver and supporting documentation shall be incorporated into the contract file.

Subchapter C Contracting Methods and Contract Types

PART 413 SIMPLIFIED ACQUISITION PROCEDURES

SUBPART 413.3 – SIMPLIFIED ACQUISITION METHODS

Sec.

413.302 Purchase orders.

413.302-5 Clauses.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 413.3 – SIMPLIFIED ACQUISITION METHODS

413.302 Purchase orders.

413.302-5 Clauses.

The contracting officer shall insert the clause at AGAR 452.204-70, Modification for Contract Closeout, in all solicitations and contracts that use simplified acquisition procedures.

PART 414 SEALED BIDDING

SUBPART 414.4--OPENING OF BIDS AND AWARD OF CONTRACT

Sec.

414.404 Rejection of bids.

414.407 Mistakes in bids.

414.407-3 Other mistakes disclosed before award.

414.407-4 Mistakes after award.

414.409 Information to bidders.

414.409-2 Award of classified contracts.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 414.4--OPENING OF BIDS AND AWARD OF CONTRACT

414.404 Rejection of bids.

414.404-1 Cancellation of invitations after opening.

An acquisition official at a level above the contracting officer is authorized to request the determinations under FAR 14.404-1(c) and (e)(1).

414.407 Mistakes in bids.

414.407-3 Other mistakes disclosed before award.

The authority to make the determinations under FAR 14.407-3(a), (b), and (d) is delegated, without power of redelegation, to the HCA. The authority to make the determination under FAR 14.407-3(c) is delegated to the contracting officer. Each determination pursuant to FAR 14.407-3 shall have the concurrence of the Office of the General Counsel (OGC).

414.407-4 Mistakes after award.

If a mistake in bid is disclosed after award, the contracting officer shall make a final determination in accordance with the provisions of FAR 14.407-4 (b) and (c) and shall coordinate each proposed determination with OGC. Such coordination shall, at a minimum, consist of the contracting officer providing the proposed determination and the case file to OGC for comment.

414.409 Information to bidders.

414.409-2 Award of classified contracts.

Disposition of classified information shall be in accordance with Departmental Regulation and Manual (3400-001 Series) and in accordance with direction issued by the USDA Office of Homeland Security (OHS), Personnel and Document Security Division.

PART 415 CONTRACTING BY NEGOTIATION

SUBPART 415.2—SOLICITATION AND RECEIPT OF PROPOSALS AND INFORMATION

Sec.

415.204 Contract format.

SUBPART 415.3—SOURCE SELECTION

415.305 Proposal evaluation.

SUBPART 415.6—UNSOLICITED PROPOSALS

415.604 Agency points of contact.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 415.2—SOLICITATION AND RECEIPT OF PROPOSALS AND INFORMATION

415.204 Contract format.

The HCA is authorized to exempt contracts from the uniform contract format.

SUBPART 415.3—SOURCE SELECTION

415.305 Proposal evaluation.

Each Mission Area senior contracting official is responsible for establishing procedures regarding the release of cost information to the members of the technical evaluation team per FAR 15.305(a)(4).

SUBPART 415.6—UNSOLICITED PROPOSALS

415.604 Agency points of contact.

Each Mission Area senior contracting official is responsible for establishing points of contact for the control of unsolicited proposals. An unsolicited proposal must be formally submitted to the Agency by way of the point of contact.

PART 416 TYPES OF CONTRACTS

SUBPART 416.1—SELECTING CONTRACT TYPES

Sec.

416.102 Policies.

SUBPART 416.2--FIXED-PRICE CONTRACTS

416.203 Fixed-price contracts with economic price adjustment.

416.203-4 Contract clauses.

SUBPART 416.6--TIME-AND- MATERIALS, LABOR-HOUR, AND LETTER

CONTRACTS

416.603 Letter contracts.

416.603-2 Application.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 416.1—SELECTING CONTRACT TYPES

416.102 Policies.

The contracting officer shall insert the clause at AGAR 452.204-70, Modification for Contract Closeout, in all solicitations and contracts that use other than cost reimbursement contract types.

SUBPART 416.2--FIXED-PRICE CONTRACTS

416.203 Fixed-price contracts with economic price adjustment.

416.203-4 Contract clauses.

An economic price adjustment clause based on cost indexes of labor or material may be used under the conditions listed in FAR 16.203-4(d) after HCA approval and consultation with the Office of the General Counsel (OGC).

SUBPART 416.6--TIME-AND- MATERIALS, LABOR-HOUR, AND LETTER CONTRACTS

416.603 Letter contracts.

416.603-2 Application.

The HCA is authorized to extend the period for defining a letter contract required by FAR 16.603-2(c) in extreme cases where it is determined in writing that such action is in the best interest of the Government.

PARTS 417 and 418 [Reserved]

Subchapter D Socioeconomic Programs

PART 419 SMALL BUSINESS PROGRAMS

SUBPART 419.2—POLICIES

Sec.

419.201 General Policy.

419.201-71 Small business coordinators.

419.201-72 Reports.

SUBPART 419.6—CERTIFICATES OF COMPETENCY AND DETERMINATIONS OF RESPONSIBILITY

419.602 Procedures.

419.602-3 Resolving differences between the agency and the Small Business Administration.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 419.2—POLICIES

419.201 General policy.

419.201-71 Small business coordinators.

The Mission Area senior contracting official shall designate, in writing, small business coordinator(s). The number of coordinators shall be determined by the Mission Area senior contracting official and sufficient for the number of contracting officers or contracting offices.

419.201-72 Reports.

The Office of Small & Disadvantaged Business Utilization (OSDBU) Director shall be responsible for submitting reports concerning USDA's progress and achievements in the procurement preference program.

SUBPART 419.6—CERTIFICATES OF COMPETENCY AND DETERMINATIONS OF RESPONSIBILITY

419.602 Procedures.

419.602-3 Resolving differences between the agency and the Small Business Administration.

The HCA is authorized to appeal the issuance of a Certificate of Competency (COC) to SBA as provided by FAR 19.602-3(a).

PARTS 420 and 421 [Reserved]

PART 422 APPLICATION OF LABOR LAWS TO GOVERNMENT

ACQUISITIONS

SUBPART 422.3—CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

Sec.

422.302 Liquidated damages and overtime pay.

**SUBPART 422.4--LABOR STANDARDS FOR CONTRACTS INVOLVING
CONSTRUCTION**

422.404 Construction Wage Rate Requirements statute wage determinations.

422.404-6 Modifications of wage determinations.

422.406 Administration and enforcement.

422.406-8 Investigations.

SUBPART 422.8--EQUAL EMPLOYMENT OPPORTUNITY

422.804 Affirmative action programs.

422.804-2 Construction.

422.807 Exemptions.

SUBPART 422.13—EQUAL OPPORTUNITY FOR VETERANS

422.1305 Waivers.

SUBPART 422.14—EMPLOYMENT OF WORKERS WITH DISABILITIES

422.1403 Waivers.

SUBPART 422.70—LABOR LAW VIOLATIONS

422.7001 Contract clause.

422.7002 Contract clause.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 422.3—CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

422.302 Liquidated damages and overtime pay.

The Mission Area senior contracting official is authorized to review determinations of liquidated damages due under section 104(c) of the Contract Work Hours and Safety Standards Act, and to recommend remedial action, if appropriate, in accordance with FAR 22.302(c). Contractors or subcontractors may request review of administrative determinations of liquidated damages by written notice to the contracting officer. The contracting officer shall promptly

forward appeals of liquidated damages determinations to the Mission Area senior contracting official.

SUBPART 422.4--LABOR STANDARDS FOR CONTRACTS INVOLVING CONSTRUCTION

422.404 Construction Wage Rate Requirements statute wage determinations.

422.404-6 Modifications of wage determinations.

The Mission Area senior contracting official is authorized to process the request for extension of the 90-day period for award after bid opening as provided in FAR 22.404-6(b)(6).

422.406 Administration and enforcement.

422.406-8 Investigations.

The HCA is authorized to submit reports of violations to the agency head in accordance with FAR 22.406-8(d).

SUBPART 422.8--EQUAL EMPLOYMENT OPPORTUNITY

422.804 Affirmative action programs.

422.804-2 Construction.

The Mission Area senior contracting official shall ensure that each contracting office awarding nonexempt construction contracts maintains a current listing of covered geographical areas subject to affirmative action requirements specifying goals for minorities and women in covered construction trades, as provided in FAR 22.804-2(b).

422.807 Exemptions.

The HCA oversees exemptions of all or part of the requirements of E.O. 11246 pursuant to FAR 22.807(c).

SUBPART 422.13—EQUAL OPPORTUNITY FOR VETERANS

422.1305 Waivers.

The Assistant Secretary for Administration (ASA) is authorized to make the waiver determination in FAR 22.1305(b) that a contract is essential to the national security. The waiver

shall be prepared for the ASA's signature and submitted by the Mission Area senior contracting official to the SPE for referral to the ASA.

SUBPART 422.14—EMPLOYMENT OF WORKERS WITH DISABILITIES

422.1403 Waivers.

The ASA is authorized to make the waiver determinations under FAR 22.1403(a) and FAR 22.1403(b) with the concurrence of the Deputy Assistant Secretary for Federal Contract Compliance Programs, Department of Labor. The waiver shall be prepared for the ASA's signature and submitted by the Mission Area senior contracting official to the SPE for referral to the ASA.

SUBPART 422.70—LABOR LAW VIOLATIONS

422.7001 Contract clause.

The clause at AGAR 452.222-70, Labor Law Violations, is to be inserted in solicitations and contracts that exceed the simplified acquisition threshold. Contracting officers shall work with their Mission Area senior contracting official to report violations to the HCA within two working days following notification by the contractor. Assertions pertaining to AGAR 452.222-70 are binding and incorporated by reference into the contract.

422.7002 Contract clause.

The clause at AGAR 452.222-71, Past Performance Labor Law Violations, is to be inserted in solicitations that exceed the simplified acquisition threshold. Assertions pertaining to AGAR 452.222-71 are binding and incorporated by reference into the contract.

PART 423 ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG- FREE WORKPLACE

SUBPART 423.4--USE OF RECOVERED MATERIALS AND BIOBASED PRODUCTS

Sec.

423.404 Agency affirmative procurement programs.

SUBPART 423.5--DRUG-FREE WORKPLACE

423.506 Suspension of payments, termination of contract, and debarment and suspension actions.

SUBPART 423.6—NOTICE OF RADIOACTIVE MATERIAL

423.601 Requirements.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 423.4--USE OF RECOVERED MATERIALS AND BIOBASED PRODUCTS

423.404 Agency affirmative procurement programs.

The USDA affirmative procurement program (APP) policy applicable to all USDA agencies and staff offices is hereby established. Components of the APP are in the USDA Contracting Desk Book, 423.404.

SUBPART 423.5--DRUG-FREE WORKPLACE

423.506 Suspension of payments, termination of contract, and debarment and suspension actions.

The SPE will submit the request for a waiver to the agency head with a recommendation for action per FAR 23.506(e).

SUBPART 423.6—NOTICE OF RADIOACTIVE MATERIAL

423.601 Requirements.

The HCA shall establish a system of instructions to identify the installation/facility radiation protection officer.

PART 424 [Reserved]

PART 425 FOREIGN ACQUISITION

SUBPART 425.6—AMERICAN RECOVERY AND REINVESTMENT ACT-BUY

AMERICAN STATUTE-CONSTRUCTION MATERIALS

Sec.

425.603 Exceptions.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 425.6—AMERICAN RECOVERY AND REINVESTMENT ACT-BUY

AMERICAN STATUTE-CONSTRUCTION MATERIALS

425.603 Exceptions.

The Secretary, without power of redelegation, has the authority to make the necessary determination(s) and authorize award(s) of contract(s) in accordance with FAR 25.603(b).

PART 426 [Reserved]

Subchapter E General Contracting Requirements

PART 427 [Reserved]

PART 428 BONDS AND INSURANCE

SUBPART 428.1—BONDS AND OTHER FINANCIAL PROTECTIONS

Sec.

428.101 Bid guarantees.

428.101-1 Policy on use.

428.106 Administration.

428.106-6 Furnishing information.

SUBPART 428.2—SURETIES AND OTHER SECURITY FOR BONDS

428.203 Individual sureties.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 428.1—BONDS AND OTHER FINANCIAL PROTECTIONS

428.101 Bid guarantees.

428.101-1 Policy on use.

The SPE may authorize class waivers of the requirement to obtain bid guarantees per FAR 28.101-1(c).

428.106 Administration.

428.106-6 Furnishing information.

HCAAs or their designees may furnish certified copies of bonds and the contracts for which they were given as provided by FAR 28.106-6(c). Requesters may be required to pay costs of certification and copying established by the Departmental Fee Schedule for records requests (7 CFR part 1, subpart A, appendix A).

SUBPART 428.2—SURETIES AND OTHER SECURITY FOR BONDS

428.203 Individual sureties.

Evidence of possible criminal or fraudulent activities by an individual surety shall be reported to the OIG in accordance with Departmental Regulations (1700 series). The Mission Area senior contracting official shall establish procedures to ensure protection and conveyance of deposited securities of the types listed in FAR 28.204-1 through 28.204-3.

PART 429 [Reserved]

PART 430 COST ACCOUNTING STANDARDS ADMINISTRATION

SUBPART 430.2---CAS PROGRAM REQUIREMENTS

Sec.

430.201 Contract requirements.

430.201-5 Waiver.

430.202 Disclosure requirements.

430.202-2 Impracticality of submission.

430.202-8 Subcontractor disclosure statements.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 430.2---CAS PROGRAM REQUIREMENTS

430.201 Contract requirements.

430.201-5 Waiver.

The SPE, without the authority to further redelegate, is authorized to request the Cost Accounting Standards Board to waive the application of the Cost Accounting Standards (CAS) in accordance with FAR 30.201-5.

430.202 Disclosure requirements.

430.202-2 Impracticality of submission.

The Secretary, without the power to redelegate, is authorized to determine, in accordance with 48 CFR 9903.202-2, that the Disclosure Statement is impractical to secure and to authorize award without obtaining the Disclosure Statement.

430.202-8 Subcontractor disclosure statements.

The Secretary, without the power to redelegate, is authorized to determine, in accordance with 48 CFR 9903.202-2, that the Disclosure Statement for a subcontractor is impractical to secure and to authorize award without obtaining the Disclosure Statement.

PART 431 CONTRACT COST PRINCIPLES AND PROCEDURES

SUBPART 431.1---APPLICABILITY

Sec.

431.101 Objectives.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 431.1---APPLICABILITY

§ 431.101 Objectives.

(a) The SPE is designated as the official authorized to give advance approval of an individual deviation concerning cost principles.

(b) The SPE is designated as the official authorized to give advance approval of a class deviation concerning cost principles after coordination with the Civilian Agency Acquisition Council (CAAC).

PART 432 CONTRACT FINANCING

Sec.

432.001 Definitions.

432.006 Reduction or suspension of contract payments upon finding of fraud.

432.006-5 Reporting.

432.007 Contract financing payments.

SUBPART 432.1--NON- COMMERCIAL ITEM PURCHASE FINANCING

432.114 Unusual contract financing.

SUBPART 432.2—COMMERCIAL ITEM PURCHASE FINANCING

432.206 Solicitation provisions and contract clauses.

SUBPART 432.3--LOAN GUARANTEES FOR DEFENSE PRODUCTION

432.301 Definitions.

SUBPART 432.4—ADVANCE PAYMENTS FOR NON-COMMERCIAL ITEMS

432.402 General.

432.406 Letters of credit.

432.407 Interest.

432.412 Contract clause.

SUBPART 432.7—CONTRACT FUNDING

432.703 Contract funding requirements.

432.770 USDA specific funding limitations.

SUBPART 432.8—ASSIGNMENT OF CLAIMS

432.802 Conditions.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

§ 432.001 Definitions.

Agency contract finance office is the office, other than the office of the requisitioner, providing funding or performing funding record keeping for the contract action.

Head of agency. For the purposes of this part, head of the agency means, exclusively, the Secretary or the Deputy Secretary.

Remedy coordination official (RCO). The USDA RCO is the Assistant Secretary for Administration.

Responsible fiscal authority is that officer in the agency contract finance office with the responsibility to ensure that adequate funds are available and usable for the intended purpose.

432.006 Reduction or suspension of contract payments upon finding of fraud.

432.006-5 Reporting.

The annual report required by FAR 32.006-5 is to be prepared by the SPE and submitted to the Secretary within 90 calendar days after the end of the fiscal year. When signed by the Secretary, the report is to be maintained by the SPE.

432.007 Contract financing payments.

The Mission Area senior contracting official may prescribe, on a case- by-case basis, a shorter period for financing payments.

SUBPART 432.1--NON-COMMERCIAL ITEM PURCHASE FINANCING

432.114 Unusual contract financing.

The HCA is authorized to approve unusual contract financing.

SUBPART 432.2—COMMERCIAL ITEM PURCHASE FINANCING

432.206 Solicitation provisions and contract clauses.

The responsibility for administration of the liquidation provisions of a contract may not be transferred from the contracting officer.

SUBPART 432.3--LOAN GUARANTEES FOR DEFENSE PRODUCTION

432.301 Definitions.

Within this subpart, the *agency or guaranteeing agency* is the HCA and may not be redelegated.

SUBPART 432.4—ADVANCE PAYMENTS FOR NON-COMMERCIAL ITEMS

432.402 General.

An HCA is designated as the individual responsible for making the findings and determination, and for approval of the contract terms concerning advance payments.

432.406 Letters of credit.

The HCA is designated as the individual responsible for coordination with the Department of Treasury concerning letters of credit.

432.407 Interest.

(a) The HCA is designated as the individual who may authorize, on a case-by-case basis, advance payments without interest for the contract types described in FAR 32.407(d)(1), through (4). The signed determination and findings supporting these authorizations shall be included in the contract files.

(b) The SPE is designated as the individual who may authorize advance payments without interest other than those described in paragraph (a) of this section.

432.412 Contract clause.

The decision to use Alternates I or III to FAR 52.232-12 must be supported by a determination and finding.

SUBPART 432.7—CONTRACT FUNDING

432.703 Contract funding requirements.

Use the clause AGAR 452.232-70, Limitation of Government's Obligation, in solicitations and resultant incrementally funded fixed-price contracts.

432.703-3 Contracts crossing fiscal years.

Funds appropriated to USDA may be used for one-year contracts which are to be performed in two fiscal years so long as the total amount for such contracts is obligated in the year for which the funds are appropriated (7 U.S.C. 2209c).

432.770 USDA specific funding limitations.

The expenditure of any USDA appropriation for any consulting service through any contract, pursuant to section 3109 of Title 5 of the U.S. Code shall be limited to those contracts where such expenditures are a matter of public record and available for public inspection, except where otherwise provided under existing law, or under existing Executive Order issued pursuant to existing law (7 U.S.C. 2225a).

SUBPART 432.8—ASSIGNMENT OF CLAIMS

432.802 Conditions.

Written notices of assignment and a true copy of the assigned instrument are to be sent to the contracting officer rather than the agency head per FAR 32.802(e)(1). Other copies are distributed as directed in FAR 32.802.

PART 433 PROTESTS, DISPUTES AND APPEALS

SUBPART 433.1—PROTESTS

Sec.

433.102 General.

SUBPART 433.2—DISPUTES AND APPEALS

433.203 Applicability.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 433.1--PROTESTS

433.102 General.

The SPE is responsible for coordinating the processing of bid protests lodged with the Government Accountability Office (GAO).

SUBPART 433.2—DISPUTES AND APPEALS

433.203 Applicability.

The Assistant Secretary for Administration is authorized to determine the applicability of the Contract Disputes Act to contracts with foreign governments pursuant to FAR 33.203.

Subchapter F Special Categories of Contracting

PART 434 MAJOR SYSTEM ACQUISITION

Sec.

434.001 Definition.

434.002 Policy.

434.003 Responsibilities.

434.005 General requirements.

434.005-6 Full production.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

434.001 Definition.

Pursuant to OMB Circular No. A-11 (Circular A-11) and the definition at FAR 2.101, within USDA, a system shall be considered a *major system* if:

- (a) The system has been identified as a Major IT Investment pursuant to USDA Departmental Regulation 3030-008, Definition of Major Information Technology Investments,
- (b) The total non-IT acquisition costs are estimated to be \$50 million or more, or
- (c) The system, regardless of estimated acquisition or life cycle costs, has been specifically designated to be a major system by the USDA Acquisition Executive or by the Major Information Technology Systems Executive. The Assistant Secretary for Administration (ASA) is the USDA Acquisition Executive for major system acquisition other than acquisitions of information technology.

434.002 Policy.

In addition to the policy guidance at FAR 34.002 and other parts of the FAR, the policies outlined in part 7 of Circular A- 11 should serve as guidelines for all contracting activities in planning and developing systems, major or otherwise.

434.003 Responsibilities.

(a) The key executives of USDA (Secretary, Deputy Secretary, Under Secretaries and Assistant Secretaries) individually or as a group will participate in making four key decision in each major system acquisition process.

(1) Identification and definition of a specific mission need to be fulfilled, the relative priority assigned within the agency, and the general magnitude of resources that may be invested.

(2) Selection of competitive system design concepts to be advanced to a test/demonstration phase or authorization to proceed with the development of a noncompetitive (single concept) system.

(3) Commitment of a system to full-scale development and limited production.

(4) Commitment of a system to full production.

(b) The Chief Information Officer (CIO) is the Major Information Technology Systems Executive. For acquisitions of information technology, the CIO will ensure that Circular A-11 is implemented in USDA and that the management objectives of Circular A-11 are realized. The CIO is responsible for designating the program manager for each major information technology system acquisition, designating an acquisition to be a major information technology system acquisition, and approving the written charter and project control system for each major information technology system acquisition.

(c) The ASA will ensure that Circular A-11 is implemented in USDA and that the management objectives of Circular A-11 are realized. The ASA is responsible for designating the program manager for each major system non-IT acquisition, designating an acquisition to be a major system non-IT acquisition, and approving the written charter and project control system for each major system non-IT acquisition.

(d) The Mission Area senior contracting official must:

(1) Ensure compliance with the requirements of Circular A-11, FAR part 34, and AGAR part 434.

(2) Ensure that potential major system acquisitions are brought to the attention of the USDA Acquisition Executive or the Major Information Technology Systems Executive, as appropriate.

(3) Coordinate with Mission Area Program Managers (MASPMs) to recommend qualified candidates for designation as program managers for each major system acquisition within their jurisdiction.

(4) Coordinate with MASPMs to verify that program managers fulfill their responsibilities and discharge their duties.

(5) Cooperate with the ASA and Major Information Technology Systems Executive in implementing the requirements of Circular A-11.

(e) The program manager is responsible for planning and executing the major system acquisition, ensuring appropriate coordination with the USDA Acquisition Executive, Major Information Technology Systems Executive, and other key USDA executives.

434.005 General requirements.

434.005-6 Full production.

The Secretary or the Secretary's designee for the specific program is the agency head for the purposes of FAR 34.005-6.

PART 435 [Reserved]

PART 436 CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

SUBPART 436.2--SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

Sec.

436.205 Statutory cost limitations.

436.209 Construction contracts with architect-engineer firms.

436.213 Special procedures for sealed bidding in construction contracting.

436.213-2 Presolicitation notices.

SUBPART 436.5—CONTRACT CLAUSES

436.500 Scope of subpart.

436.570 Emergency response, fire suppression and liability.

SUBPART 436.6--ARCHITECT- ENGINEER SERVICES

436.602 Selection of firms for architect-engineer contracts.

436.602-1 Selection criteria.

436.602-5 Short selection process for contracts not to exceed the simplified acquisition threshold.

436.603 Collecting data on and appraising firm's qualifications.

436.609 Contract clauses.

436.609-1 Design within funding limitations.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 436.2--SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

436.205 Statutory cost limitations.

(a) When it appears that funds may be insufficient for all the desired features of construction, the contracting officer may provide in the solicitation for a base bid item covering the work as specified and for one or more additive or deductive bid items which progressively add or omit specified features of the work in a stated order of priority.

(b) In the alternative, the contracting officer may use the policies and procedures found in FAR 17.2, Options.

436.209 Construction contracts with architect-engineer firms.

The HCA is authorized to approve a contract to construct a project, in whole or in part, to the firm that designed the project (inclusive of its subsidiaries or affiliates).

436.213 Special procedures for sealed bidding in construction contracting.

436.213-2 Presolicitation notices.

The authority to waive a presolicitation notice on any construction requirement when the proposed contract is expected to exceed the simplified acquisition threshold is restricted to the HCA.

SUBPART 436.5—CONTRACT CLAUSES

436.500 Scope of subpart.

This subpart prescribes clauses for insertion in USDA solicitations and contracts for construction and for dismantling, demolition, or removal of improvements or structures. The

contracting officer shall use the clauses as prescribed in contracts that exceed the simplified acquisition threshold. The contracting officer may use the clauses if the contract amount is expected to be at or below the simplified acquisition threshold.

436.570 Emergency response, fire suppression and liability.

The contracting officer shall insert the clause at AGAR 452.236-70, Emergency Response, Fire Suppression and Liability, in Integrated Resource Service Contracts (IRSCs) awarded for the Forest Service. The clause AGAR 452.236-70, Emergency Response, Fire Suppression and Liability, is optional for non-IRSCs.

SUBPART 436.6--ARCHITECT- ENGINEER SERVICES

436.602 Selection of firms for architect-engineer contracts.

436.602-1 Selection criteria.

The Mission Area senior contracting official is authorized to approve the use of design competition under the conditions in FAR 36.602-1(b).

436.602-2 Evaluation boards.

The Mission Area senior contracting official shall establish written procedures for providing permanent or ad hoc architect-engineer evaluation boards as prescribed in FAR 36.602-2.

436.602-5 Short selection process for contracts not to exceed the simplified acquisition threshold.

The Mission Area senior contracting official may include either or both procedures in FAR 36.602-5(a) and (b) in the procedures for evaluation boards.

436.603 Collecting data on and appraising firm's qualifications.

Mission Area senior contracting officials for Mission Areas that require architect-engineer services shall establish procedures to comply with the requirements of FAR 36.603.

436.609 Contract clauses.

436.609-1 Design within funding limitations.

(a) Should the HCA appoint a designee to make the determination in FAR 36.609-1(c)(1), the appointment may be to one no lower than the official authorized to commit program funds for the work being acquired.

(b) The contracting officer, with the advice of appropriate technical representatives, may make the determination in FAR 36.609-1(c)(2) or (3).

PART 437 SERVICE CONTRACTING

SUBPART 437.1—SERVICE CONTRACTS-GENERAL

Sec.

437.104 Personal services contracts.

SUBPART 437.2—ADVISORY AND ASSISTANCE SERVICES

437.204 Guidelines for determining availability of personnel.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 437.1—SERVICE CONTRACTS-GENERAL

437.104 Personal services contracts.

USDA has the following specific statutory authorities to contract for personal services:

(a) Section 706(a) of the Organic Act of 1944 (7 U.S.C. 2225) authorizes contracting with persons or organizations on a temporary basis, without regard to civil service compensation classification standards in 5 U.S.C., chapter 51 and subchapter III of chapter 53, Provided:

(1) That no expenditures shall be made unless specifically provided for in the applicable appropriation, and

(2) Expenditures do not exceed any limitations prescribed in the appropriation.

(b) Title 7 U.S.C., section 1627 authorizes the Secretary of Agriculture to contract with technically qualified persons, firms or organizations to perform research, inspection,

classification, technical, or other special services, without regard to the civil-service laws,
Provided: it is for a temporary basis and for a term not to exceed six months in any fiscal year.

SUBPART 437.2—ADVISORY AND ASSISTANCE SERVICES

437.204 Guidelines for determining availability of personnel.

The HCA is authorized to request the use of non-Government evaluators in proposal evaluations. Each decision shall be supported by a written determination in accordance with FAR 37.204.

PARTS 438 through 441 [Reserved]

Subchapter G Contract Management

PARTS 442 through 444 [Reserved]

PART 445 GOVERNMENT PROPERTY

SUBPART 445.1—GENERAL

Sec.

445.103 General.

SUBPART 445.3—AUTHORIZING THE USE AND RENTAL OF GOVERNMENT PROPERTY

445.301 Use and rental.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 445.1—GENERAL

445.103 General.

The Mission Area senior contracting official is authorized to make determinations for charging rent on the basis of use under the Use and Charges clause in FAR 52.245-9 as prescribed in FAR 45.103(a)(5).

SUBPART 445.3—AUTHORIZING THE USE AND RENTAL OF GOVERNMENT PROPERTY

445.301 Use and rental.

(a) The Mission Area senior contracting official is authorized to make determinations for providing facilities to contractors as prescribed in FAR 45.301(f).

(b) Requests for non-Government use of plant equipment as prescribed in FAR 45.301 shall be submitted by the HCA to the SPE for approval.

PARTS 446 through 448 [Reserved]

PART 449 TERMINATION OF CONTRACTS

SUBPART 449.5—CONTRACT TERMINATION CLAUSES

Sec.

449.501 General.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 449.5—CONTRACT TERMINATION CLAUSES

449.501 General.

Use of special purpose termination clauses pursuant to the authority of FAR 49.501 shall be approved in advance by the HCA.

**PART 450 EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY
ACT**

SUBPART 450.1 EXTRAORDINARY CONTRACTUAL ACTIONS

Sec.

450.100 Definitions.

450.102 Delegation of and limitations on exercise of authority.

450.102-1 Delegation of authority.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 450.1 EXTRAORDINARY CONTRACTUAL ACTIONS

450.100 Definitions.

Approving authority, as used in this part, means the Assistant Secretary for Administration.

Secretarial level, as used in this part means the Assistant Secretary for Administration.

450.102 Delegation of and limitations on exercise of authority.

450.102-1 Delegation of authority.

The Assistant Secretary for Administration is authorized to approve all actions under FAR part 50 except indemnification actions listed in FAR 50.102-1(d), which must be approved by the Secretary, without power of redelegation.

PART 451 [Reserved]

Subchapter H Clauses and Forms

PART 452 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

SUBPART 452.2--TEXTS OF PROVISIONS AND CLAUSES

Sec.

452.204-70 Modification for Contract Closeout

452.204-71 Personal Identity Verification of Contractor Employees.

452.222-70 Labor Law Violations.

452.222-71 Past Performance Labor Law Violations.

452.232-70 Limitation of Government's Obligation.

452.236-70 Emergency Response, Fire Suppression, and Liability.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

SUBPART 452.2--TEXTS OF PROVISIONS AND CLAUSES

452.204-70 Modification for Contract Closeout.

As prescribed in AGAR 404.804, 413.302-5, and 416.102, insert the following clause:

MODIFICATION FOR CONTRACT CLOSEOUT (MONTH YEAR)

Upon contract closeout for contracts utilizing anything other than cost reimbursement (i.e., Simplified Acquisition Procedures (SAP), non-SAP, and/or not Firm Fixed Price): if unobligated funds in the amount of \$1000 or less remain on the contract, the Contracting Officer (CO) shall issue a unilateral modification for deobligation. The contractor will receive a copy of the

modification but will not be required to provide a signature. The CO shall immediately proceed with contract closeout upon completion of the period of performance, receipt and acceptance of supplies or services, and final payment.

Upon contract closeout for contracts utilizing SAP: if unobligated funds of more than \$1000 remain on the contract, the CO shall issue a bilateral modification for deobligation. The contractor will receive a copy of the modification and will be required to provide a signature. (The CO may also request a “Contractor Release of Claims” be completed by the contractor, although not required for contracts and orders using SAP procedures.) If the bilateral modification and Release of Claims are not returned to the CO within 60 days, the CO shall release the modification as unilateral and proceed with contract closeout upon completion of the period of performance, receipt and acceptance of supplies or services, and final payment.

Upon contract closeout for contracts utilizing anything other than cost reimbursement (i.e., non-SAP and/or not FFP): if unobligated funds of more than \$1000 remain on the contract, the CO shall issue a bilateral modification for deobligation. The contractor will receive a copy of the modification and a “Contractor Release of Claims” and will be required to provide a signature on both forms. If the bilateral modification and Release of Claims are not returned to the CO within 120 days, the CO shall release the modification as unilateral and proceed with contract closeout upon completion of the period of performance, receipt and acceptance of supplies or services, and final payment.

(End of Clause)

452.204-71 Personal Identity Verification of Contractor Employees.

As prescribed in AGAR 404.1303, insert the following clause:

PERSONAL IDENTITY VERIFICATION OF CONTRACTOR EMPLOYEES (MONTH
YEAR)

(a) The contractor shall comply with the personal identity verification (PIV) policies and procedures established by the United States Department of Agriculture (USDA) Directives 4620-002 series.

(b) Should the USDA Directives 4620-002 require the exclusion of a contractor's employee, the contracting officer will notify the contractor in writing.

(c) The contractor must appoint a representative to manage compliance with the PIV policies established by the USDA Directives 4620-002 and to maintain a list of employees eligible for a USDA LincPass required for performance of the work.

(d) The responsibility of maintaining a sufficient workforce remains with the contractor. Contractor employees may be barred by the Government from performance of work should they be found ineligible or to have lost eligibility for a USDA LincPass. Failure to maintain a sufficient workforce of employees eligible for a USDA LincPass may be grounds for termination of the contract.

(e) The contractor shall insert this clause in all subcontracts when the subcontractor is required to have routine unaccompanied physical access to a Federally controlled facility and/or routine unaccompanied access to a Federally controlled information system.

(f) The PIV Sponsor for this contract is a designated program point of contact, which in most cases is the COR, unless otherwise specified in this contract. The PIV Sponsor will be available to receive contractor identity information from [hours and days to be added by CO] to [hours and days to be added by CO] at [office address for registration to be added by CO]. The Government will notify the contractor if there is a change in the PIV Sponsor, the office address, or the office hours for registration; however, it is the contractor's responsibility to meet all aspects of paragraphs (c), (d), and (e).

(End of Clause)

452.222-70 Labor Law Violations.

As prescribed in AGAR 422.7001, insert the following clause:

LABOR LAW VIOLATIONS (MONTH YEAR)

In accepting this contract award, the contractor certifies that it is in compliance with all applicable labor laws and that, to the best of its knowledge, its subcontractors of any tier, and suppliers, are also in compliance with all applicable labor laws. The Department of Agriculture will vigorously pursue corrective action against the contractor and/or any tier subcontractor (or supplier) in the event of a violation of labor law(s) made in the provision of supplies and/or services under this or any other government contract. The contractor is responsible for promptly reporting to the contracting officer if and when adjudicated evidence of noncompliance occurs. The Department of Agriculture considers certification under this clause to be a certification for purposes of the False Claims Act. The Department will cooperate as appropriate regarding labor laws applicable to the contract which are enforced by other agencies. Applicable Labor Laws include:

- (a) The Fair Labor Standards Act;
- (b) The Occupational Safety and Health Act;
- (c) The Migrant and Seasonal Agricultural Workers Protection Act;
- (d) The National Labor Relations Act;
- (e) The Davis-Bacon Act;
- (f) The Service Contract Act;
- (g) Executive Order 11246 (Equal Employment Opportunity);
- (h) Section 503 of the Rehabilitation Act of 1973;
- (i) The Vietnam Era Veterans' Readjustment Assistance Act;
- (j) The Family and Medical Leave Act;
- (k) Title VII of the Civil Rights Act of 1964;
- (l) The Americans with Disabilities Act of 1990;
- (m) The Age Discrimination in Employment Act of 1967;

(n) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors);

(o) Equivalent State laws, as defined by the Secretary of Labor in guidance.

(p) Executive Order 13627 (Strengthening Protections Against Trafficking in Persons in Federal Contracts)

The contractor and any subcontractors shall incorporate into lower tier subcontracts a requirement that the information described above be provided to the contractor.

(End of clause)

452.222-71 Past Performance Labor Law Violations.

As prescribed in AGAR 422.7002, insert the following clause:

PAST PERFORMANCE LABOR LAW VIOLATIONS (MONTH YEAR)

In submitting this offer, the offeror (prospective contractor) certifies to the best of the offeror's knowledge and belief, that they, and any subcontractor at any tier, are in compliance with all previously required corrective actions for adjudicated labor law violations (see applicable labor laws in 452.222-70).

Prior to receiving an award, a contractor shall provide a list of the specific violations of the legal requirements listed above, if any, and be given an opportunity to disclose any steps taken to correct the violations of, or improve compliance with, such legal requirements. The contracting officer in coordination with their Mission Area senior contracting official will consider any information provided and determine whether a contractor is a responsible source that has a satisfactory record of integrity and business ethics. The contracting officer shall ensure that contractors update the information provided every 6 months and that they require their subcontractors to update them on the aforementioned information every 6 months.

The contractor and any subcontractors shall incorporate into lower-tier subcontracts a requirement that the information described above be provided to the contractor.

(End of Clause)

452.232-70 Limitation of Government's Obligation.

As prescribed in AGAR 432.703, insert the following clause:

LIMITATION OF GOVERNMENT'S OBLIGATION (MONTH YEAR)

(a) Contract line item(s) listed below is/are incrementally funded. For this/these item(s), the sum of \$ [Contracting Officer insert after negotiations] of the total price is presently available for payment and allotted to this contract. An allotment schedule is set forth in paragraph (j) below.

Line Item	Price	Currently Allotted Funding	Funds Required for Complete Funding
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(b) For item(s) identified in paragraph (a) as not fully funded, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement of costs in the event of termination of those item(s) for the Government's convenience, approximates the total amount currently allotted to the contract. The Contractor is not authorized to continue work on those item(s) beyond that point. The Government will not be obligated in any event to reimburse the Contractor more than the amount allotted to the contract for those item(s) regardless of anything to the contrary in the clause entitled "Termination for Convenience of the Government". The total amount payable by the Government in the event of termination of applicable contract line item(s) for convenience includes costs, profit, and estimated termination settlement costs for those item(s).

(c) Notwithstanding the dates specified in the allotment schedule in paragraph (j), the Contractor will notify the contracting officer in writing at least [30, 60, or 90, as appropriate] days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount currently allotted to the contract for performance of the applicable item(s). The notification will state (1) the estimated date when that point will be reached and (2) an estimate of additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds

identified in paragraph (j), or to a mutually agreed upon substitute date. The notification will also advise the contracting officer of the estimated amount of additional funds that will be required for the timely performance of the item(s) funded, for a subsequent period as may be specified in the allotment schedule in paragraph (j) or otherwise agreed to by the parties. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed substitute date, the contracting officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract entitled "Termination for Convenience of the Government".

(d) When additional funds are allotted for continued performance of the contract line item(s) identified in paragraph (a) above, the parties will agree as to the period of contract performance which will be covered by the funds. The provisions of paragraphs (b) through (d) will apply similarly to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(e) If, solely by reason of failure of the Government to allot additional funds, by the dates indicated below, in amounts sufficient for timely performance of the contract line item(s) identified in paragraph (a), the Contractor incurs additional costs or is delayed in the performance of the work under this contract and if additional funds are allotted, an equitable adjustment will be made in the price or prices (including appropriate target, billing, and ceiling prices where applicable) of the item(s), or in the time of delivery, or both. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact within the meaning of the clause entitled "Disputes."

(f) The Government may at any time prior to termination allot additional funds for the performance of the contract line item(s) identified in paragraph (a) above.

(g) The termination provisions do not limit the rights of the Government under the clauses entitled "Default" and "Termination for Cause". The provisions are limited to the work and allotment of funds for the contract line item(s) set forth in paragraph (a) above. These terms

no longer apply once the contract is fully funded except with regard to the rights or obligations of the parties concerning equitable adjustments negotiated under paragraphs (e) and (f) above.

(h) Nothing herein affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled "Termination for Convenience of the Government".

(i) Nothing herein shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(j) The parties agree that the Government will allot funds to this contract in accordance with the following schedule:

On execution of contract	\$
(month) (day), (year)	\$
(month) (day), (year)	\$
(month) (day), (year)	\$

(End of Clause)

§ 452.236-70 Emergency Response, Fire Suppression, and Liability.

As prescribed in AGAR 436.570, the following clause shall be used in Forest Service Integrated Resource Service Contracts (IRSCs), and is optional for non-IRSCs:

EMERGENCY RESPONSE, FIRE SUPPRESSION AND LIABILITY (MONTH YEAR)

(a) *Contractor's Responsibility for Responding to Emergencies.* When directed by the contracting officer, the Contractor shall allow the Government to temporarily use employees and equipment from the work site for emergency work (anticipated to be restricted to firefighting). This is considered to be within the general scope of the contract. An equitable adjustment for the temporary use of employees and equipment will be made under the CHANGES clause, FAR 52.243-4.

(b) *Contractor's Responsibility for Fire Fighting.* The Contractor, under the provisions of FAR 52.236-9, Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements, shall immediately extinguish all fires on the work site other than those fires in

use as a part of the work. The Contractor may be held liable for all damages and for all costs incurred by the Government for labor, subsistence, equipment, supplies, and transportation deemed necessary to control or suppress a fire set or caused by the Contractor or the Contractor's agents, subcontractors, or employees subject to the fire classifications listed in subsection (c).

(c) *Fire Suppression Costs.* The Contractor's obligations for cost of fire suppression vary according to three classifications of fires as follows:

(1) *Operations Fire.* An “operations fire” is a fire caused by the Contractor's operations other than a negligent fire. The Contractor agrees to reimburse the Forest Service for such cost for each operations fire, subject to a maximum dollar amount of [Contracting Officer insert amount]. The cost of the Contractor's actions, supplies, and equipment expended or used on suppressing any such fire, or otherwise provided at the request of Forest Service, shall be credited toward such maximum. If the Contractor's actual cost exceeds the contractor's maximum obligation stated above, the Forest Service shall reimburse the contractor for the excess.

(2) *Negligent Fire.* A “negligent fire” is a fire caused by the negligence or fault of the Contractor's operations including, but not limited to, one caused by smoking by persons engaged in the Contractor's operations during the course of their employment, or during rest or lunch periods; or if the Contractor's failure to comply with requirements under this contract results in a fire starting or permits a fire to spread. Damages and the cost of suppressing negligent fires shall be borne by the Contractor.

(3) *Other Fires on Contract Area.* The Forest Service shall pay the Contractor, at firefighting rates common in the area or at prior agreed rates, for equipment or personnel furnished by the Contractor at the request of the Forest Service, on any fire on the contract area other than an operations fire or a negligent fire.

(d) *Contractor's Responsibility for Notification in Case of Fire.* The Contractor shall immediately notify the Government of any fires sighted on or in the vicinity of the work site.

(e) *Performance by the Contractor.* Where the Contractor's employees, agents, contractors, subcontractors, or their employees or agents perform the Contractor's operations in connection with fire responsibilities, the Contractor's obligations shall be the same as if performance was by the Contractor.

(f) *State Law.* The Contractor shall not be relieved by the terms of this contract of any liability to the United States for fire suppression costs recovered in an action based on State law, except for such costs resulting from operations fires. Amounts due to the Contractor for firefighting expenditures on operations fires shall not be withheld pending settlement of any such claim or action based on State law.

(End of Clause)

PARTS 453 through 469 [Reserved]

Subchapter I Food Assistance Programs

PART 470 COMMODITY ACQUISITIONS

Sec.

470.000 Scope of part.

470.101 Definitions.

470.102 Policy.

470.103 United States origin of agricultural products.

470.201 Acquisition of commodities and freight shipment for Foreign Agricultural Service (FAS) programs.

470.202 Acquisition of commodities for United States Agency for International Development (USAID) programs.

470.203 Cargo preference.

Authority: 5 U.S.C. 301 and 40 U.S.C. 486(c).

470.000 Scope of part.

This part sets forth the policies, procedures and requirements governing the procurement of agricultural commodities by the Department of Agriculture for use:

(a) Under child nutrition programs such as the National School Lunch Program, The Emergency Food Assistance Program, Commodity Supplemental Food Program, Food Distribution Program on Indian Reservations, and any other domestic food assistance program.

(b) Under Title II of the Food for Peace Act (7 U.S.C. 1721 et seq.), the Food for Progress Act of 1985, the McGovern-Dole International Food for Education and Child Nutrition Program, and any other international food assistance program.

470.101 Definitions.

The following definitions are applicable to this subpart:

Commingled product means grains, oilseeds, rice, pulses, other similar commodities and the products of such commodities, when such commodity or product is normally stored on a commingled basis in such a manner that the commodity or product produced in the United States cannot be readily distinguished from a commodity or product not produced in the United States.

Foreign Agriculture Service (FAS) means such agency located within the Department of Agriculture.

Free alongside ship (f.a.s.) (* named port of shipment)* means a term of sale where the seller fulfills its obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. The buyer bears all costs and risks of loss of or damage to the goods from that moment.

Grantee organization means an organization which will receive commodities from the United States Agency for International Development under Title II of the Food for Peace Act (7 U.S.C. 1721 et seq.) or from the Foreign Agricultural Service under the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other international food assistance program.

Ingredient means spices, vitamins, micronutrients, desiccants, and preservatives when added to an agricultural commodity product.

Last contract lay day means the last day specified in an ocean freight contract by which the carriage of goods must start for contract performance.

Lowest landed cost means with respect to an agricultural product acquired under this part, the lowest aggregate cost for the acquisition of such product and the shipment of such product to a foreign destination.

Multi-port or multi-trip voyage charter means the charter of an ocean carrier in which the carrier will stop at two or more ports to discharge cargo.

470.102 Policy.

(a) *Policy.* USDA follows the policies and procedures set forth in the FAR as supplemented by the AGAR, in the procurement of agricultural commodities and products of agricultural commodities that are used in domestic and international food assistance and nutrition programs.

(b) *Electronic submission.* To the maximum extent possible, the use of electronic submission of solicitation-related documents shall be used with respect to the acquisition of agricultural commodities and related freight. However, to the extent that a solicitation allows for the submission in paper or hard copy format in addition to information in an electronic format and there is a discrepancy in such submissions, the information submitted in paper or hard copy format shall prevail unless the electronic submission states that a specific existing written term is superseded by the electronic submission.

(c) *Freight.* With respect to the acquisition of freight for the shipment of agricultural commodities and products of agricultural commodities, the provisions of the FAR, including part 47, shall be utilized as applicable and various types of services to be obtained may include multi-trip voyage charters.

470.103 United States origin of agricultural products.

(a) *Products for use in international food assistance programs.* As provided by 7 U.S.C. 1732(2) and 1736o-1(a) commodities and the products of agricultural commodities acquired for use in international feeding and development programs shall be products of United States origin. A product shall not be considered to be a product of the United States if it contains any ingredient that is not produced in the United States if that ingredient is:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

(b) *Products for use in domestic food assistance programs.* Commodities and the products of agricultural commodities acquired by USDA for use in domestic food assistance programs shall be a product of the United States, except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States except with respect to ingredients as defined above. Ingredients from non-domestic sources will be allowed to be utilized as a United States product if such ingredients are not otherwise:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

(c) *Commingled product.* (1) Except as provided in paragraph (c)(2) of this section, a commingled product shall be considered to be a product of the United States if the offeror can establish that the offeror has in inventory at the time the contract for the commodity or product is awarded to the offeror, or obtains during the contract performance period specified in the solicitation, or a combination thereof, a sufficient quantity of the commodity or product that was produced in the United States to fulfill the contract being awarded, and all unfulfilled contracts that the offeror entered into to provide such commingled product to the United States.

(2) To the extent USDA has determined a commodity is one that is generally commingled but is also one which can be readily stored on an identity preserved basis with respect to its country of origin, USDA may require that the commodity procured shall be of 100 percent United States origin.

(d) *Product derived from animals.* With respect to the procurement of products derived from animals, the solicitation will set forth any specific requirement that is applicable to the country in which the animal was bred, raised, slaughtered or further processed.

470.201 Acquisition of commodities and freight shipment for Foreign Agricultural Service (FAS) programs.

(a) Lowest landed cost and delivery considerations.

(1) Except as provided in paragraphs (a)(3) and (4) of this section, in contracts for FAS for commodities and related freight shipment for delivery to foreign destinations, the contracting officer shall consider the lowest landed cost of delivering the commodity to the intended destination. This lowest landed cost determination will be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement, or a related freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or related freight, when combined with other offers for commodities or related freight, results in a lower landed cost.

(2) USDA may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors considered in this determination may include, but not be limited to: the adequacy of building structures, proper ventilation, freedom from insects and rodents,

cleanliness, and overall good housekeeping and warehousing practices. USDA may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of USDA to have the commodity delivered in a safe and timely manner. Such situations include:

- (i) A port is congested;
- (ii) Port facilities are overloaded;
- (iii) A vessel would not be able to dock and load cargo without delay;
- (iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or
- (v) Other similar situation that may adversely affect the ability of USDA to have the commodity delivered in a timely manner.

(3) Use of other than lowest landed cost. In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, the contracting officer may award an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section if:

(i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or

(ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors may adversely affect the delivery of such commodities through damage or untimely delivery. Such similar factors include, but are not limited to: port congestion; overloaded facilities at the port; vessels not being able to dock and load cargo without delay due to conditions at the port; labor

disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the timely delivery of the commodity;

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured; or

(E) The contracting officer determines that extenuating circumstances preclude awards on the basis of lowest-landed cost, or that efficiency and cost-savings justify use of types of ocean service that would not involve an analysis of freight. However, in all such cases, commodities would be transported in compliance with cargo preference requirements. Other types of services may include, but are not limited to, multi-trip voyage charters, indefinite delivery/indefinite quantity (IDIQ), delivery cost and freight (C & F), delivery cost insurance and freight (CIF), and indexed ocean freight costs.

(4) If the contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer will provide to the Head of Contracting Activity or Designee a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis consistent with title 48 of the CFR. This request shall include a statement of the reasons for not using lowest landed cost basis. The HCA, or the designee one level above the contracting officer, may either accept or reject this request and shall document this determination.

(b) *Multiple offers or delivery points.* If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(c) *Freight shipping and rates.* (1) In determining the lowest-landed cost, USDA shall use the freight rates offered in response to solicitations issued by USDA or, if applicable, the grantee organization.

(2) Freight rates offered must be submitted as specified in the solicitation issued by USDA or, if applicable, the grantee organization. Any such solicitation issued by a grantee organization must contain the following elements:

(i) If directed by USDA, include a closing time for the receipt of written freight offers and state that late written freight offers will not be considered;

(ii) Provide that freight offers are required to have a canceling date no later than the last contract lay day specified in the solicitation;

(iii) Provide the same deadline for receipt of written freight offers from both U.S. flag vessel and non-U.S. flag vessels; and

(iv) Be received and opened prior to any related offer for acquisition of commodities to be shipped.

(3) USDA may require organizations that will receive commodities from USDA to submit information relating to the capacity of a U.S. port, or, if applicable, a terminal, prior to the acquisition of such commodities or freight.

(d) *Freight rate notification.* If USDA is not the party procuring freight with respect to a shipment of an agricultural commodity for delivery to a foreign destination, the organization that will receive commodities from USDA, or its shipping agent, shall be notified by USDA of the vessel freight rate used in determining the commodity contract award and the organization will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate.

470.202 Acquisition of commodities for United States Agency for International Development (USAID) programs.

(a) *Lowest landed cost and delivery considerations.* (1) Except as provided in paragraphs (a)(3) and (e)(2) of this section, with respect to the acquisition of agricultural commodities for delivery to foreign destinations and related freight to transport such commodities under Title II of Public Law 83-480, contracts will be entered into in a manner that will result in the lowest landed cost of such commodity delivery to the intended destination. This lowest landed cost determination shall be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement, or a freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or freight, when combined with other offers for commodities or freight, results in a lower landed cost.

(2) USDA may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors which will be considered in this determination will include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. USDA may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of USDA to have the commodity delivered in a safe and/or timely manner. Such situations include:

- (i) A port is congested;
- (ii) Port facilities are overloaded;
- (iii) A vessel would not be able to dock and load cargo without delay;

(iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or

(v) Other similar situation that may adversely affect the ability of the Department to have the commodity delivered in a timely manner.

(3) In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, USDA may complete an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section, if:

(i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or

(ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors will adversely affect the delivery of such commodities without damage or in a timely manner. Such similar factors include, but are not limited to: port congestion; overloaded facilities at the port; vessels would not be able to dock and load cargo without delay; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the ability of USDA to achieve timely delivery of the commodity; or

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured.

(4) If the contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer shall provide to the HCA or Designee and to USAID, a written request to obtain commodities and

freight in a manner other than on a lowest landed cost basis. This request shall include a statement of the reasons for not using lowest landed cost basis. The HCA or Designee one level above the contracting officer, with the concurrence of USAID, shall, on an expedited basis, either accept or reject this request and shall document this determination in writing and provide a copy to USAID.

(b) *Freight shipping and rates.* (1) In determining lowest-landed cost as specified in paragraph (a) of this section, USDA shall use vessel rates offered in response to solicitations issued by USAID or grantee organizations receiving commodities under 7 U.S.C. 1721 et seq.

(2) USAID may require, or direct a grantee organization to require, an ocean carrier to submit offers electronically through a Web-based system maintained by USDA. If electronic submissions are required, USDA may, at its discretion, accept corrections to such submissions that are submitted in a written form other than by use of such Web-based system.

(c) *Delivery date.* The contracting officer shall consider total transit time, as it relates to a final delivery date, in order to satisfy program requirements for Title II of Public Law 83-480.

(d) *Multiple awards or delivery points.* (1) If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(2) The contracting officer may determine that extenuating circumstances preclude awards on the basis of lowest landed cost. However, in all such cases, commodities may be transported in compliance with cargo preference requirements as determined by USAID.

(3) The contracting officer shall notify USAID or, if applicable, the grantee organization, that its shipping agent will be notified of the vessel freight rate used in determining the

commodity contract award. The grantee organization or USAID will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate so used.

470.203 Cargo preference.

An agency having responsibility under this subpart shall administer its programs, with respect to this subpart, in accordance with regulations prescribed by the Secretary of Transportation.

PARTS 471 through 499 [Reserved]

Tiffany J. Taylor,

Senior Procurement Executive (SPE),

Director, Office of Contracting and Procurement.

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